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U.S. Citizenship
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DEC 02 2004

FILE: WAC 03 006 53635 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for further consideration and action.

The petitioner is a computer chassis manufacturer that seeks to employ the beneficiary as a corporate business liaison officer. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the ground that the beneficiary was ineligible for classification as an alien employed in a specialty occupation. The director stated that the beneficiary possessed lawful permanent status as defined at 8 C.F.R. § 1.1(p). According to the director, the record indicated that as of March 7, 2001, the beneficiary had an approved application for adjustment of status (Form I-485) based on an approved immediate relative immigrant petition. The director stated that Citizenship and Immigration Services' (CIS) final decision to approve the beneficiary's lawful permanent resident status disqualified her as a nonimmigrant worker. As such, the beneficiary was found ineligible for classification as an alien employed in a specialty occupation.

On appeal, counsel states that the beneficiary is eligible for a change of status because the beneficiary's marriage terminated prior to the grant of conditional permanent residency. Counsel states, on the other hand, if CIS adopts the view that the beneficiary lost her immigration status due to the dissolution of her marriage, then the beneficiary should be permitted to change to a nonimmigrant status such as H-1B. Counsel submits an endorsed copy of the document entitled "Request for Judgment, Judgment of Dissolution of Marriage, and Notice of Entry of Judgment."¹

The regulation at 8 C.F.R. § 214.2(h)(15) states that the director shall make a separate determination on the requests to extend the petition and the alien's stay even though the two requests are combined on the petition. Here, the director should have made a separate determination on the H-1B petition and the application for a change of status.

In the denial letter, the director found the beneficiary ineligible for classification as an alien employed in a specialty occupation on the ground that the beneficiary was not eligible for a change of status. The director's decision did conclude that the beneficiary was not eligible for a change of status. The regulation at 8 C.F.R. § 243.3(g) provides that the denial of an application for a change of status may not be appealed. Accordingly, the petitioner may not appeal the director's decision regarding the application for a change of status. The decision of the director, however, did not determine whether the proffered position qualified as a specialty occupation and whether the beneficiary was qualified to perform the duties of a specialty occupation. Accordingly, the matter will be remanded to make such a determination and to review all relevant issues. The director may request any additional evidence he deems necessary. Upon receipt of all evidence and representations, the director will enter a new decision.

¹ It is noted that the beneficiary was granted conditional permanent residency on March 7, 2001. The beneficiary subsequently divorced on February 27, 2002, and did not file the joint petition to remove the conditional basis on residence within 90 days before March 7, 2003 as required under 8 C.F.R. § 216.4(a)(6). Thus, it appears that since March 7, 2003 the beneficiary has no legal status in the United States.

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The matter will be remanded for further consideration and action consistent with the above discussion and entry of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.